No. 98-1173

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

CITY OF ATLANTA, GEORGIA,

Petitioner,

v.

R. MAYER OF ATLANTA, INC.; TONY N. UPCHURCH d/b/a CHUCK'S TRUCK; REGINA JENKINS d/b/a JENKINS WRECKER SERVICE CO.; FRED BURT d/b/a QUALITY WRECKER SERVICE; and UPMAN'S WRECKER SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE TEXAS MUNICIPAL LEAGUE, TEXAS CITY ATTORNEYS ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, TOWN OF PANTEGO, TEXAS, CITIES OF ARLINGTON, TEXAS, AUSTIN, TEXAS, BEDFORD, TEXAS, BIRMINGHAM, ALABAMA, HOUSTON, TEXAS, LUBBOCK, TEXAS, MEMPHIS, TENNESSEE, AND SAN ANTONIO, TEXAS IN SUPPORT OF PETITIONER CITY OF ATLANTA, GEORGIA

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STATEMENT OF CONSENT

Pursuant to Supreme Court Rule 37.2.a, to the extent consent is necessary, written consent of all parties has been obtained to file this Amicus Brief, and such consent accompanies the filing of this Brief.

INTEREST OF AMICI CURIAE[1]

Amici Curiae urge the Court to grant certiorari in this case to clarify the extent to which a federal statute preempts safety regulations or provisions adopted by Cities or local governments concerning towing services.[2]

The Texas Municipal League is a non-profit association of over 1,000 Texas Municipalities. Over 13,000 mayors, council members, city managers, city attorneys, and department heads are member officials of the League by virtue of their cities' participation. The TML legal defense program was established to monitor major litigation that affects municipalities and to file briefs on behalf of cities in cases of special significance to municipalities.

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[1] Disclosure pursuant to Supreme Court Rule 37.6 – The brief was not authored at all by counsel for a party. No fees are to be paid to the author by any person. The entire expense of printing and serving the Brief is to be paid by the Texas Municipal League Intergovernmental Self-Insurance Risk Pool Fund.

[2] 49 U.S.C. § 14501(c)(1) expressly preempts city and state regulation of the routes, prices, or services of motor carriers of property. 49 U.S.C. § 14501(c)(2)(A) creates an exception whereby the preemption provision "shall not restrict" state safety regulatory authority with respect to motor vehicles.

The Texas City Attorneys Association, an affiliate of the Texas Municipal League, is an organization of attorneys who represent Texas Cities and city officials in the performance of their duties.

The International Municipal Lawyers Association is a non-profit, professional organization of more than 1,500 members that has provided services and programs to local government lawyers since 1935. IMLA is the oldest and largest association of attorneys who represent this nation's municipalities, counties, and special districts. Since its establishment, IMLA has been an advocate for the rights and privileges of local governments and the attorneys who represent them. More specifically, the IMLA Legal Advocacy Program serves its membership by being an advocate for the interests, positions, and views of local governments on municipal legal issues involved in cases pending in the United States Supreme Court, in federal circuit courts, and in state appellate and supreme courts.

The Town of Pantego, Texas is an incorporated municipality located in Tarrant County, Texas. Pantego, Texas is in the process of reviewing its towing ordinances and regulations.

The City of Austin, Texas is a home rule municipality located in Travis County, Texas. The City of Austin is in the process of reviewing its vehicle towing ordinances.

The City of San Antonio, Texas is a home rule municipality located in Bexar County, Texas. The City of San Antonio is currently a party to an appeal to the United States Court of Appeals for the Fifth Circuit regarding the impact of 49 U.S.C. § 14501 on Municipal

Towing Ordinances. (*Stuckey et al. v. City of San Antonio, et al.*, Fifth Circuit Appeal No. 98-50934). Additionally, the City of San Antonio is currently in the process of revising its private property towing ordinances.

The City of Birmingham, Alabama is the largest city in the State of Alabama, and has for many years regulated both consensual and non-consensual tows within its jurisdiction. The State of Alabama has virtually no regulation of towing either by private car or by commercial wrecker. Given the potentiality for harm to persons and/or property due to an uninsured and uninspected vehicle hauling behind it, on the public rights-of-way, at minimum a 2,000 pound object, it is inconceivable to the City of Birmingham that the Eleventh Circuit could interpret the law in such a narrow and illogical way. Counsel for Amicus, the City of Birmingham, serves both as the City Attorney for the City of Birmingham, and also serves as President Pro Tem of the Alabama House of Representatives. As an attorney actively involved in State and City government, Counsel fully concurs in the need for this Court to clarify the law.

The City of Lubbock, Texas is a home rule municipality located in Lubbock County, Texas. The City of Lubbock has recently become involved in litigation regarding the preemption question as it pertains to municipalities regulating safety issues concerning tow trucks. (Cause No. 5:98-CV-0292-C in the Northern District of Texas, Lubbock Division).

The City of Bedford, Texas is a home rule municipality located in Tarrant County, Texas. The City of Bedford is presently involved in on-going litigation, pending

in the Fifth Circuit, which involves the issue of the impact of 49 U.S.C. § 14501's preemption and safety provisions concerning municipal actions pertaining to tow truck services. (*Cardinal Towing, et al. v. City of Bedford, et al.*, Fifth Circuit Appeal No. 98-10194, District Court Opinion reported at 991 F.Supp. 573 (N.D. Tex. 1998).

The City of Arlington has a comprehensive ordinance regulating nonconsent towing based upon the safety exception to preemption found in 49 U.S.C. § 14501(c)(2)(A). The Eleventh Circuit's opinion in *Mayer* jeopardizes the City's ordinance and creates a regulatory vacuum with regard to nonconsent towing safety.

The City of Houston, Texas is a home rule municipality located in Harris County, Texas. The City of Houston has enacted ordinances that regulate the manner in which tow trucks may operate pursuant to the City's concerns over traffic and highway safety. At least a portion of the City's ordinances were upheld as valid safety provisions pursuant to 49 U.S.C. § 14501(c)(2)(A), and were not subject to preemption under 49 U.S.C. § 14501(c)(1) in a lawsuit reported as: *Harris County Wrecker Owners v. City of Houston*, 943 F. Supp. 711 (S.D. Tex. 1996). The Eleventh Circuit's decision expressly disagrees with the Texas District Court's analysis of the safety exception to preemption in that lawsuit.

Cities or local political subdivisions historically have adopted safety regulations pertaining to non-consent towing of wrecked, or disabled, or abandoned vehicles located on public streets, or in some other position where such vehicles might be hazardous. States such as Texas,

and apparently Georgia, have not adopted comprehensive safety regulations, leaving most aspects of the safety regulation of towing services to cities and counties. However, the Eleventh Circuit's decision states that the so-called safety exception from preemption is limited to safety regulations adopted by a State, and that political subdivisions of a State are not authorized to rely upon the safety exception from preemption.[3] Therefore, the Eleventh Circuit's opinion holds that safety regulations of towing services, which are adopted by a political subdivision of a State, are preempted, and therefore invalid. The Eleventh Circuit's decision expressly disagreed with the opinions in two Texas U.S. District Court cases.[4] Presently, the Eleventh Circuit's decision in the *Mayer* case is the only circuit court opinion construing the safety exception to preemption. Previously, the reported District Court opinions, which construed the safety exception to preemption, reached the conclusion that municipalities or local units of government were allowed to rely upon the

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[3] The Eleventh Circuit's decision was made in the context of regulations pertaining to consensual towing. A fair reading of the Eleventh Circuit's opinion leaves the impression that the Eleventh Circuit's interpretation also applies in the context of non-consent emergency towing.

[4] *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 545 (11th Cir. 1998), disagreeing with *Harris County Wrecker Owners v. City of Houston*, 943 F.Supp. 711 (S.D. Tex. 1996); *A.J.'s Wrecker Service, Inc. v. City of Dallas*, Nos. CA3:97-DV1311D, CA3:97-CV2398D, 1998 WL# 185521 (N.D. Tex. April 15, 1998). Another Texas District Court opinion also concluded that cities could adopt safety provisions. *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 991 F.Supp. 573, 576 (N.D. Tex. 1998), appeal pending in the Fifth Circuit – Cause No. 98-10194.

safety exception to preemption. The Eleventh Circuit's opinion creates uncertainty in the law. There is also the risk that other courts will follow the interpretation of the Eleventh Circuit, either as precedent or as persuasive authority. If other courts follow the Eleventh Circuit's lead in striking municipal safety regulation of towing services, this will create a vacuum in the safety regulation of towing services because neither Congress, nor the State of Texas[5] have adopted any comprehensive regulatory scheme pertaining to safety aspects of towing. Therefore, based upon the uncertainty in the law, and based upon the clear need for safety regulation of towing, Amici Curiae requests this Court to grant the Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

A. If the Eleventh Circuit's Decision is Followed, a Vacuum will be Created in the Safety Regulation of Towing Services

At least two states have little or no safety regulation in the context of non-consent, police initiated, tows of wrecked, abandoned, or disabled vehicles. (Texas and Georgia). Texas has some technical requirements for accident scene tow trucks. These requirements may be found at 16 Tex. Admin. Code § 5.513(a)(1) through (7). Generally, the Texas technical requirements for accident scene tow trucks require the tow trucks to be equipped with a

[5] Nor apparently the State of Georgia. (See City of Atlanta's Petition for Writ of Certiorari pp. 15-17 and App. 72-77; See also App. 16-17) Nor the State of Alabama. (See Statement of Interest of Amicus City of Birmingham, Alabama).

specified fire extinguisher, a crowbar or wrecking bar, a broom, or other device for clearing debris, emergency reflectors, safety cones, or flairs, a container to carry glass and debris, a spot light or flash light, and flashing warning lights on the tow truck itself. Texas has no other safety requirements directly applicable to the towing of wrecked, abandoned, or disabled vehicles. In fact, the technical requirements may not even apply in Texas to the towing of abandoned or disabled vehicles that are not wrecked. Texas has no provision requiring tow trucks to appear at the scene of the accident within any specified period of time. Texas has no regulation limiting tow trucks from engaging in the dangerous practice of racing to an accident scene.[6]

Apparently the State of Georgia likewise has adopted little or no safety regulation of towing services pertaining to the non-consent towing of wrecked, abandoned, or disabled vehicles. (See generally The City of Atlanta, Georgia's Petition for Certiorari, page 16, and the statutes and appendices referred to therein.) Congress has not adopted any safety regulations or standards pertaining to towing services in the context of the non-consent towing of wrecked, abandoned, or disabled vehicles. At least in

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[6] A number of District Courts have recognized the validity and wisdom of municipal safety regulations prohibiting or limiting the number of wreckers swarming to the scene of an accident, since such a swarm of wreckers in and of itself could create a safety hazard. See generally *Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F.Supp. 711, 732 (S.D. Tex. 1996); *Ace Auto Body and Towing v. City of New York*, 1997 WL# 669891 (S.D.N.Y. 1997); *A.J.'s Wrecker Service, Inc. v. City of Dallas*, 1998 WL# 185521 (N.D. Tex. 1998).

Texas and Georgia, such safety regulation has customarily been handled at the local level by Cities or Counties. In fact, shortly after Congress adopted the predecessor to 49 U.S.C. § 14501, the Texas Legislature adopted Article 6675c which has now been recodified in the Texas Transportation Code at § 643.201(a). The Texas Statute expressly states:

> "In addition to the registration requirements of this Article, a municipality may regulate the operation of a tow truck to the extent allowed by federal law." (Tex. Rev. Civ. Stat. Ann. Art. 6675c § 11(a), codified at Tex. Trans. Code § 643.201(a)).

Because Congress has not adopted any safety regulations, and because at least the State of Texas and Georgia for the most part leave such regulations to local units of government, there would be no meaningful safety regulation in the context of non-consent towing of wrecked, abandoned, or disabled vehicles if the Eleventh Circuit's interpretation is followed. The public has a need for safety at the scene of wrecked, abandoned, or disabled vehicles. It would be grossly irresponsible for Congress to have preempted local regulations of safety, and for Congress to prevent States from delegating to municipalities such safety regulations before Congress adopts its own safety regulatory scheme, which, of course, it has not done. The Eleventh Circuit in *Mayer* has not offered a compelling reason why it should be assumed that Congress intended such an unfathomable legislative design.[7]

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[7] Amici Curiae borrow some of the thoughts expressed by Judge Barry in his analysis of whether or not Congress intended

Even though such safety regulation historically has been delegated to local units of government, the Eleventh Circuit's *Mayer* opinion would not allow local units of State government to exercise safety authority.

B. The Eleventh Circuit's *Mayer* Opinion Forbidding Local Safety Regulation Conflicts with this Court's Analysis in *Mortier*.[8]

> "When motor vehicles crash into each other, or pedestrians, or into bridges, railings or other fixed objects, they cause problems not only for the owners and occupants of the motor vehicles and pedestrians, but also for society as a whole. Over and above the injuries and fatalities caused by such crashes, when motor vehicles become disabled upon the public streets and highways, they present traffic hazards in and of themselves. They also retard and sometimes completely halt the flow of traffic upon those streets and highways. Since every occupant of a motor vehicle in the United States insists upon moving from wherever he or she is, to some other place as rapidly as possible, it is imperative that obstructions to the flow of vehicular traffic be eliminated with dispatch." *Brumfield Towing Service, Inc. v. City of Baton Rouge*, 911 F.Supp. 212, 214 (M.D.LA. 1996).

The Eleventh Circuit's opinion in *Mayer* interprets 49 U.S.C. § 14501(c)(1) which in pertinent part states:

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to preempt state and local regulation of the prices of non-consent tows. *416 Bloomfield Avenue Corp. v. City of Newark*, 904 F.Supp. 364, 374 (D.N.J. 1995).

[8] *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991).

> "General Rule – except as provided in paragraphs (2) and (3), a State, [or a] political subdivision of a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." *Mayer*, 158 F.3d at 543.

For purposes of this Amicus Brief, Amici will assume that the Eleventh Circuit correctly concluded that a tow truck is a motor carrier subject to the provisions of 49 U.S.C. § 14501(c)(1).

Section 14501(c)(1) is the preemption clause which was the subject of *Mayer* and is the subject of this Amicus Brief. However, the preemption clause is modified by an *express exception to preemption* found in 49 U.S.C. § 14501(c)(2)(A) as follows:

> "[the preemption clause in 49 U.S.C. § 14501(c)(1)] . . . shall not restrict the safety regulatory authority of a State with respect to motor vehicles . . . "

Despite the clearly expansive exception from preemption, the Eleventh Circuit incorrectly concluded that safety ordinances or regulations enacted by municipalities or other political subdivisions of a State were preempted because such enactments were not done by a State. 158 F.3d 545-548. In reaching this conclusion, the Eleventh Circuit decided that the Supreme Court decision in *Mortier* was inapplicable.

Mortier involved an analysis of the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) codified at 7 U.S.C. § 136 et seq. The Eleventh Circuit concluded that

Mortier's application of preemption rules, in the context of FIFRA, did not mandate a finding of non-preemption when the Eleventh Circuit interpreted the interplay between 49 U.S.C. § 14501(c)(1) and § 14501(c)(2)(A). (App. 18-22). In short, the Eleventh Circuit concluded that the safety exception to preemption allows States, but not Cities, to regulate safety aspects of towing services.

The Eleventh Circuit incorrectly applies *Mortier*. In doing so, the Eleventh Circuit does not follow well-settled precedent of this Court mandating construction of preemption statutes in a way that would result in a finding of no preemption in this case.

> "Preemption should not be inferred from every enactment that overlaps State regulation. Instead, we start with the assumption that the historic police powers of the State [are] not to be superseded by [a federal statute] unless that was the 'clear and manifest purpose of Congress'. *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). This presumption against preemption applies to state or local regulations of matters of health and safety. *Hillsboro County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715, 105 S.Ct. 2371, 2376, 85 L.Ed. 2d 714 (1985). *Pennington Corporation v. Vistron Corp.*, 876 F.2d 414, 417 (5th Cir. 1989).

Assuming that Congress intended to preempt State and local regulation of the prices, routes, or services of tow truck operations, Congress also created a very broad exception to preemption by stating that the preemption provisions "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." There is no

doubt that towing services implicate many safety concerns. At least the State of Texas and the State of Georgia have taken very little action to create safety regulations of towing services. The Eleventh Circuit would prohibit a City or other local political subdivision from adopting safety regulations. However, in *Mortier*, this Court had no difficulty concluding in the context of FIFRA that Congress' express delineation of authority to States, allowed Cities or other political subdivisions of States, to also adopt safety regulations. *Mortier*, 501 U.S. at 606.

In the context of the present case, the exception from preemption is even broader than the exception involved in *Mortier*. In *Mortier*, the FIFRA exception from preemption expressly allowed States to regulate pesticides, so long as the regulation did not run afoul of express provisions of FIFRA. The exception at issue in this case contains no such limitation. The exception from preemption in the present case makes it clear that any preemptive provision "shall not restrict the safety regulatory authority of a State." Therefore, so long as a safety regulation is involved, the safety regulation could arguably affect a price, route, or service of a tow truck operation, but such a regulation would not be preempted. If anything, a plain reading of § 14501(c)(2)(A) demonstrates Congressional intent to allow broad and far reaching safety regulations.

In *Mortier*, this Court said that when a statute plainly authorized the States to regulate pesticides, and just as plainly was silent with reference to local governments, there was no preemption of local government's safety regulations. This Court stated that in order to find preemption of local safety regulations, there must be a clear and manifest purpose to preempt local authority. This

Court stated that such a purpose cannot be found by "mere silence." *Mortier*, 501 U.S. at 607. The Eleventh Circuit seemingly believed that silence as to delegation to local governments was equal to preemption of local safety regulatory authority.

In the context of the FIFRA provisions, which were not remotely as broad as the exception from preemption involved in this case, this Court said:

> "Indeed, the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the absolute discretion of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Mortier*, 501 U.S. at 608.

The *Mortier* Court recognized that political subdivisions such as Cities are components of the very entity the statute empowers with its exception from preemption. The exception from preemption in this case is even broader than the exception from preemption discussed and analyzed by this Court in *Mortier*. The Eleventh Circuit's opinion clearly conflicts with this Court's analysis in *Mortier*, and in *Rice v. Santa Fe Elevator Corp*, and in *Hillsboro County v. Automated Medical Laboratories*.

If the Eleventh Circuit's opinion is given effect, municipalities or local governments could be prevented from adopting safety regulations pertaining to tow truck operations, even though such safety regulations historically have been exercised at the local level, and at least in

Georgia and Texas, have not been enacted under Statewide regulations or statutes.

CONCLUSION

For the foregoing reasons, the Amici Curiae respectfully request the Court to grant the Petition for Certiorari.

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